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STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 21, 1996

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of Implementation of the
Local Competition Provisions of the
Telecommunications Act 1996 et al.,
CC Docket No. 96-128, and CC Docket No. 91-35

Dear Secretary Caton:

Enclosed are an original and eleven copies of the
Petition for Reconsideration filed by the New York State
Department of Public Service in the above-referenced proceedings.

Respectfully submitted,

Maureen O. Helmer
Maureen O. Helmer
General Counsel

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Implementation of the Pay)
Telephone Reclassification and)
Compensation Provisions of the)
Telecommunications Act of 1996)

CC Docket No. 96-128

Policies and Rules Concerning)
Operator Service Access and)
Pay Telephone Compensation)

CC Docket No. 91-35

Petition of the Public Telephone)
Council to Treat Bell Operating)
Company Payphones as Customer)
Premises Equipment)

Petition of Oncor Communications)
Requesting Compensation for)
Competitive Payphone Premises)
Owners and Resubscribed Operator)
Services Provider)

Petition of the California Payphone)
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Section 68.2(a) of the)
Commission's Rules)

Amendment of Section 69.2(m))
and (ee) of the Commission's Rules)
to Include Independent Public)
Payphones Within the "Public)
Telephone" Exemption from End)
User Common Line Access Charges)

PETITION FOR RECONSIDERATION

FILED BY
THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

Dated: October 21, 1996
Albany, New York

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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PETITION FOR RECONSIDERATION

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DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

Pursuant to 47 USCA 405 and 47 CFR 1.429, the New York State Department of Public Service (NYDPS) hereby requests that

the Federal Communications Commission (Commission) reconsider the Report and Order (Order) in the above-referenced proceeding, adopted September 20, 1996.

In its Order, the Commission seeks to eliminate regulation of the local coin rate, including the coin rate for Directory Assistance (DA), by removing the barriers to competition in the payphone market (Order ¶3). The Commission determines that it "will continue for a limited time to regulate certain aspects of the payphone market," and thereafter the market will no longer be regulated (Id.). It claims that under Section 276 it has the authority to preempt any state regulation of coin phone rates for local calling.

NYDPS files the instant petition because the Commission has again exceeded its jurisdiction. Its failure to raise the issue of deregulation of the local coin rate in its Notice of Proposed Rulemaking in this proceeding violates §553(b)(3) of the Federal Administrative Procedure Act. Moreover, the Commission does not have the authority under Section 276 to deregulate the local coin rate, including the rate charged for DA. Finally, any decision to permit the market conditions to set the local coin rates should be done by local regulators, who are in the best position to determine local market conditions.

I. THE COMMISSION'S PLAN TO DEREGULATE THE LOCAL COIN RATE FOLLOWING A TRANSITION PERIOD HAS NOT BEEN ADEQUATELY DEVELOPED OR ADDRESSED ON THE RECORD IN THIS PROCEEDING

Section 276(b)(1)(A) of the Telecommunications Act of 1996 states that the Commission shall "establish a per call

compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone...."

In its Order, the Commission states that in the NPRM in this proceeding, it proposed a range of options for ensuring fair compensation for local coin calls (Order ¶22). "One was to set a nationwide local coin rate for all calls originated by payphones. Another was for the Commission to prescribe specific national guidelines that states would use to establish a local rate to ensure that all PSPs are fairly compensated. A third was for the states to continue to set the coin rates for local payphone calls according to factors within their discretion" (*Id.*, citing NPRM ¶¶21-22). Nowhere in the NPRM did the Commission indicate that it considered local coin rate deregulation a reasonable or viable option. In fact, the Commission noted that "the states have long had a traditional and primary role in regulating payphones" and asked "what further procedures, such as a complaint or petition process, we should establish should we ultimately determine to defer to the states in setting payphone rates" (Order ¶22).

The Commission's failure to provide notice that it intended to deregulate local coin rates violates §553(b)(3) of the Administrative Procedure Act (APA). The rulemaking provisions of the APA "were designed to assure fairness and mature consideration of rules of general application" National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759, 764 (1964). Section 553(b)(3) specifically requires that a notice of

proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved" 5 USCA 553(b)(3). The NPRM, however, included no discussion of the deregulation of the payphone market.

The Courts have allowed the final rule adopted by an agency to differ from the original proposed rule, as long as the final rule is a "logical outgrowth" of the rulemaking proceeding American Federation of Labor v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985). Total deregulation of the market is clearly not a logical outgrowth of the three options presented in the NPRM. Nor was there a mature consideration of the rule adopted. There was absolutely no indication that the Commission was considering removing itself from payphone oversight as it now has concluded it will. In fact, the concept of deregulating the payphone market was raised for the first time by several Regional Bell Operating Companies (RBOCs) in their initial comments (Order ¶30).

II. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE LOCAL PAYPHONE COIN RATE

The Commission cites Section 276(b)(1) of the Telecommunications Act of 1996 (the Act) as the source of its authority to deregulate local coin rates (Order ¶20). While the Act does charge the Commission with, inter alia, "establish[ing] a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every intrastate and interstate call using their payphone..." (§276(b)(1)(A)), this provision does not provide the Commission jurisdiction over

the local coin rate. The local coin rate is a local matter reserved for state Commission jurisdiction under Section 152(b) of the Telecommunications Act of 1934.¹

The Commission incorrectly concluded that its authority to ensure that payphone providers are fairly compensated therefore gives it the authority to set end user rates. The plain language of the section makes no reference to the deregulation of end user rates; it only requires that carriers be compensated.

Review of the Act and its legislative history indicates that Congress did not use the terms "compensation" and "rates" interchangeably, and could have specified that the Commission would have authority over payphone "rates" had that been its intention. For example, §251(b)(5) addresses reciprocal compensation for transport and termination. The Conference Report on the Act notes that "the duties imposed under new Section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC network" (Conference Report at 21). In §252(d)(2) the word compensation is used in reference to the reciprocal recovery of costs (by carriers from carriers) associated with transport and termination.

¹ Nor is there any legal basis for the Commission's decision to deregulate the rate charged for calls to directory assistance.

In other provisions of the Act, however, Congress referred to retail "rates" in clear terms. In §252(d)(3), in the context of wholesale prices for telecommunications services, the Act specifically refers to charges to end users: "a state Commission shall determine wholesale rates on the basis of retail rates charged to subscribers...." There is no reference to service providers being "compensated" by subscribers.

The Commission's own decisions historically have used the word "compensation" when referring to inter-carrier payment arrangements, and "rates" when referring to end-user charges. As used in past Commission proceedings addressing payphone issues, the term "compensation" has been used to refer to amounts collected by competitive payphone providers from interexchange carriers.¹ For example, in In Re Application of Iowa Network Access Division, 3 FCC Rcd 1466, 1472 n29 (1988), the Commission explains that "[t]he agreement allows...the designated carrier...to establish rates and file tariffs for intraLATA toll calls as well as define what compensation each carrier that participates in a toll call receives."

III. THE COMMISSION'S DECISION REGARDING PAYPHONE DEREGULATION IS CONTRARY TO THE PUBLIC INTEREST

The Act requires the Commission to promulgate regulations that level the payphone playing field (Section 276). NYDPS supports efforts to level the payphone playing field and

¹ See In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-35.

promote competition among payphone providers, but deregulation must not occur until there are appropriate market conditions. Any decision to permit the market conditions to set the local coin rates should be done by local regulators, who are in the best position to determine local market conditions.

NYDPS is concerned that the Commission's rules do not meet the needs of the public for reliable and affordable public telephone services. While there are over 50,000 private payphones in New York State, LECs operate approximately 150,000 payphones and will continue to control the lion's share of the payphone market.

The Commission concludes (para. 51) that unless a state can prove that market failures within the state preclude market-based rates, local coin rates will be preemptively deregulated within a year. In essence, the Commission has established a rebuttable presumption of an effectively competitive payphone market throughout the nation. This presumption is based largely on the RBOCs' claim that five largely rural, middle-American states have "deregulated" local coin rates.¹ These states (IA, NE, SD, ND, WY), encompassing less than 3 percent of the nation's population² and fewer than 2 percent of its public telephone

¹ The Commission's Order does not explain the exact nature of this "deregulation," the bases upon which the five states concluded to "deregulate" local coin rates, or any conditions that may have been imposed or agreed to by US West, which serves all five states.

² U.S. Census Bureau State Profiles (1994).

access lines¹, are hardly representative of the nation's payphone market as a whole. The Commission itself concludes "that the competitive conditions, which are a prerequisite to a deregulatory, market-based approach, do not currently exist and cannot be achieved immediately" (para. 59). Yet it offers no remedies to create the requisite competition, save removal of market entry or exit requirements (para. 60).² New York imposes no significant barriers to payphone market entry, and non-LECs operate roughly 25 percent of the state's payphones.

New York has over 50,000 privately-owned payphones, which continue to present major problems to consumers, despite the efforts of many legitimate payphone operators. Complaints against private payphone operators in New York have risen steadily from 210 complaints in 1990 to 1,164 complaints in 1994. The majority of these complaints are "high rate" complaints, followed by "can't obtain refund" and "can't access other carrier" complaints. It has been our experience that any proposal to increase local coin rates has met with extreme customer reaction and antagonism. We are also concerned about the effect of an increase in the local coin rate on those New Yorkers who depend on payphones as their sole means of access to the telecommunications network.

¹ Statistics of Communications Common Carriers, Table 2.5, FCC 1994/95.

² In fact, payphone competitors do have remedies under §253 of the Act if they believe a state policy constitutes a barrier to entry.

Although the expectation has been that private payphones will participate in a vigorously competitive payphone market, the only true competition that has developed is competition for location. Location competition often works against consumers as it promotes larger commissions to location owners, who then boost the premise surcharges levied on the consumer. This dynamic occurs, as the Commission is well aware, because most payphone providers enjoy a situational monopoly where the consumer has no readily available competitive option. In reality, these providers have the only payphone convenient to the customer, who is unlikely to delay calling until he or she can obtain access to a payphone operated by a different provider. As a result, many of the owners can and do charge high rates in order to maximize profit, to the detriment of the "captive" consumer.

Moreover, in addition to the general concerns regarding payphone deregulation, we are also concerned about a nationally mandated "market-based" rate for directory assistance calls (411). In New York these calls are free because payphone providers have been unable to maintain directories at payphone locations. This is a uniquely local issue, which highlights the need for oversight at the local level. The Act's prohibition against BOCs' subsidizing unregulated activities with revenues derived from regulated services is met by the approach we have taken in New York. New York's rules "level the playing field," because the industry as a whole (LEC and COCOT) may not charge

for intraLATA Directory Assistance service from payphone locations and COCOTs receive this service from LECs at no charge.

CONCLUSION

For all of the reasons explained above, the Commission should reconsider its decision to deregulate the payphone market following a one-year transition period. Neither the 1996 Act nor public policy considerations require that these essentially local matters be transferred to the Commission.

Respectfully submitted,

A handwritten signature in black ink, reading "Maureen O. Helmer" with a stylized flourish at the end.

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Of Counsel:
Mary E. Burgess

Dated: October 21, 1996
Albany, New York

In the Matter of

CC Docket No. 96-128 Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications Act of
1996

CC Docket No. 91-35 Policies and Rules Concerning Operator
Service Access and Pay Telephone
Compensation

Petition of the Public Telephone Council to
Treat Bell Operating Company Payphones as
Customer Premises Equipment

Petition of Oncor Communications Requesting
Compensation for Competitive Payphone
Premises Owners and Presubscribed Operator
Services Providers

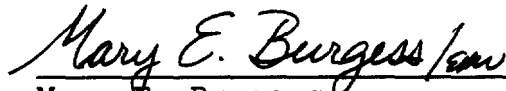
Petition of the California Payphone
Association to Amend and Clarify Section
68.2(a) of the Commission's Rules

Amendment of Section 69.2(m) and (ee) of
the Commission's Rules to Include
Independent Public Payphones Within the
"Public Telephone" Exemption from End User
Common Line Access Charges

Comments of New York State
Department of Public Service

CERTIFICATE OF SERVICE

I, Mary E. Burgess, hereby certify that an original and eleven copies of the Petition for Reconsideration filed by the New York State Department of Public Service were delivered by hand to Mr. Caton. Copies of the Petition were sent by First Class United States Mail, postage prepaid, to all parties on the attached service list.



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